86-1416

No.____



IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM MOTTO,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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20pp

## QUESTIONS PRESENTED

1. May the government bolster the credibility of accomplice witnesses by eliciting testimony during their direct examination that their plea agreements require them to take polygraph examinations if they do not testify truthfully?

2. May this conviction be upheld in light of the trial court's jury instruction that in order to convict the petitioner of a continuing criminal enterprise charge, the jury must find him guilty of the conspiracy charged in the indictment when the government conceded that the petitioner was not a manager or supervisor in the conspiracy?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM MOTTO respectfully petitions this Court for a writ of certiorari to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on December 30, 1986, upholding a prison sentence imposed on him for violation of 21 U.S.C. Section 848, the continuing criminal enterprise statute.

### OPINIONS BELOW

The Judgment Order filed on December 30, 1986 appears in the Appendix at A-1.

## JURISDICTION

The Judgment Order affirming the judgment of the District Court was entered on December 30, 1986. This Petition is filed timely pursuant to Rule 20.1, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

## STATUTES INVOLVED

*21 U.S.C. Section 848* provides in pertinent part that,

> A person is engaged in a continuing criminal enterprise if he violates any [felony] provision of [the federal drugs laws] and such violation is part of a series of violations . . . which are undertaken by such person in concert with five or more other persons with respect to whom [he] occupies a supervisory position . . . and from which [he] obtains substantial income or resources.

*21 U.S.C. Section 846* provides, "Anyone who conspires to commit any violation of the federal drug laws" is guilty of a separate crime of conspiracy.

## STATEMENT OF THE CASE

1. *The Reference to the Polygraph Provision of the Plea Agreement.* In the direct examination of the first witness, the government elicited testimony from Kenneth Weidler, a cooperating co-defendant, that his plea agreement required, "If I told a lie I would be subject to a lie detector test." Defense counsel moved for a

mistrial as such testimony improperly bolstered the credibility of the government witness. The court denied the motion, ruling that such testimony was important in assessing the credibility of the government's witnesses. Thereafter, all parties subsequently made repeated reference to the polygraph provision of these witnesses' plea agreements.

2. *The Relationship of the Conspiracy Charge to the Enterprise Charge.* Petitioner was convicted of a conspiracy to distribute cocaine as charged in Count One of the indictment, possession of cocaine with the intent to distribute on or about Labor Day weekend, September, 1984, and with conducting a continuing criminal enterprise. The government theory at trial was that the petitioner, William Motto, was a preferred customer in the conspiracy charged which was managed and directed by unindicted co-conspirator Lawrence Lavin. It was uncontested that petitioner was not an owner, manager, or supervisor of the Lavin cocaine ring charged in Count One of the indictment, but that he managed a distinct cocaine distribution network as charged in the continuing criminal enterprise count.

In the charge to the jury, the applicable portion of which appears at Appendix A-4 through A-7, the trial judge on two instances instructed the jury that to find the petitioner guilty of the continuing criminal enterprise charge, they must find him guilty of a series of violations, one of which must be the conspiracy charged in Count One of the indictment. The jury convicted on both the conspiracy charge and the enterprise charge, but the court did not ask the jury by way of special interrogatories to identify what the three predicate offenses were which the jury utilized to support the enterprise conviction.

On appeal, the panel affirmed defendant's conviction by Judgment Order.

Petitioner remains incarcerated, having been denied bail following his indictment.

## REASONS FOR GRANTING THE WRIT

### 1. The Third Circuit Order Affirming Petitioner's Conviction Conflicts With the Decisions of the Eleventh, Ninth, and Seventh Circuits Requiring That Such References to the Polygraph Provision of a Cooperating Witness' Plea Agreement Deprive a Defendant of a Fair Trial Requiring Reversal.

Twelve of the government's witnesses who were each alleged to be co-conspirators testified pursuant to negotiated plea agreements. Each of these plea agreements contained an identical provision that at the government's option they would be required to take a polygraph examination to verify the accuracy of their testimony and the truthfulness of their disclosures to the government. In affirming the trial court's ruling that reference to the polygraph provision was relevant and admissible, the panel reached a result that conflicts with all of the reported decisions on this issue.

In all instances where courts have considered admission of the fact that a government witness' plea agreement requires a polygraph as a verification of his truthfulness, courts have universally held that such testimony is prejudicial as it improperly bolsters the witness' credibility and deprives the defendant of a fair trial. Most recently, the Eleventh Circuit in *United States v. Hilton*, 772 F.2d 783 (11th Cir. 1985), held that evidence of a witness' willingness to submit to a polygraph examination was not only inadmissible but deprived defendant of a fair trial requiring reversal. *See also United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983): prosecution testimony that a provision in witnesses' plea agreements required them to submit to polygraph examinations impermissibly vouched for the credibility of the witnesses; and *United States v. Bursten*, 560 F.2d 779 (7th Cir. 1977), which condemned the introduction of

written plea agreements containing a polygraph examination clause even where the trial testimony did not emphasize the examination.

The issue thus raised is not an esoteric one unique to this case. The provision of the plea agreement concerning a polygraph examination is routinely included in plea agreements both in the District in which the case was prosecuted and throughout the country. The prosecution tactic of bolstering the credibility of an accomplice witness raises a serious due process issue as throughout the trial the court indicated that references to the polygraph examination were relevant. This severely prejudiced the petitioner whose primary defense was an attack on the credibility of the government witnesses.

**2. The Third Circuit's Decision Upholding the Conviction in Light of the Court's Charge That the Jury Must Find That the Conspiracy Charged in Count One Was a Predicate for the Enterprise Charge in Count Fifty-Six Raises an Important Question of Federal Law Which Has Not Been But Should Be Settled By This Court.**

The relationship between a conspiracy charge in violation of 21 U.S.C. Section 846 and an enterprise charge under 21 U.S.C. Section 848 has troubled federal courts since the passage of the enterprise statute. The Circuit and District Courts have grappled with the questions of whether a conspiracy charge under Section 846 is a lesser included charge under the enterprise statute, and whether the "in concert" requirement of the enterprise statute is synonymous with the conspiratorial agreement which is an element of the Section 846 charge.

This Court in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), interpreted the in concert language in the enterprise statute to mean to conspire with as utilized in 846 statute. Subsequent to

the *Jeffers* decision, numerous Circuit Courts interpreted that decision to hold that a coterminous 846 charge was a lesser included offense raising double jeopardy issues as to whether a conspiracy charge could serve as a predicate offense for purposes of establishing a series of violations within the meaning of 21 U.S.C. 848(b)(2), and whether the offenses merged for sentencing purposes. *See United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981), *cert. denied* 455 U.S. 1005, 103 S.Ct. 1642 (1981); *United States v. Aiello*, 771 F.2d 621 (2nd Cir. 1985); *United States v. Leifried*, 732 F.2d 388 (4th Cir. 1984); *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1981), *cert. denied* 105 S.Ct. 133 (1983); *United States v. Graziano*, 710 F.2d 691 (4th Cir. 1983), *reh. denied* 720 F.2d 688, *cert. denied* 104 S.Ct. 1910 (1983); *United States v. Smith*, 703 F.2d 627 (D.C. Cir. 1983); *United States v. Michel*, 588 F.2d 986 (5th Cir. 1979), *cert. denied* 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979); *United States v. Barnes*, 604 F.2d 121 (2nd Cir. 1979), *cert. denied* 446 U.S. 907, 100 S.Ct. 1833 (1980).

This Court again addressed the issue of the relationship between a conspiracy charge and an enterprise charge in *Garrett v. United States*, 105 S.Ct. 2407 (1985), for both double jeopardy and sentencing purposes. However, this case, as well as *Jeffers v. United States, supra*, has not answered the question as to whether a conspiracy charge whose time parameters overlap with those cited in an enterprise charge must necessarily be a lesser included predicate offense.

The present case raises precisely this issue. Specifically, the government witnesses repeatedly acknowledged that petitioner was not an organizer or supervisor of the Lavin cocaine ring charged as an 846 conspiracy in Count One of the indictment. Rather, the government theory was that the defendant supervised a distinct enterprise. This acknowledgement was important because it thus meant that defendant could be a co-conspirator

and guilty of Count One without supervising or managing the activities of five or more of his co-conspirators. The trial court's instruction that to find the defendant guilty of the enterprise charge, the jury must convict him of the conspiracy charge as a predicate, was thus clearly error. The jury, in light of the court's instructions, must have improperly utilized the conspiracy charge in Count One as a predicate offense, and thus improperly found there to be a series of violations for purposes of the enterprise conviction.

## CONCLUSION

To let petitioner's conviction stand in light of the clearly established precedent precluding reference to polygraph requirements of plea agreements, and in light of the confusion generated by the court's charge as to the relationship between the broad conspiracy charged in Count One which was distinct from the enterprise charged in Count Fifty-Six would be to sanction the lower court's departure from accepted standards of due process in the course of judicial proceedings. For each of the foregoing reasons, petitioner William Motto prays that this Court grant his petition for a writ of certiorari to review the judgment and affirming decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
MARC DURANT
JACK A. MEYERSON
*Attorneys for Petitioner*

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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**NOS. 86-1182 and 86-1183**

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UNITED STATES OF AMERICA

*v.*

VITO MIRRO,

*Appellant in 86-1182*

UNITED STATES OF AMERICA

*v.*

WILLIAM MOTTO, a/k/a Billy Motto, Billy Martino, Billy South Philly, B.S.P., Downtown William Motto,

*Appellant in 86-1183*

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Criminal Nos. 85-00214-06 and 85-00214-02)
Honorable Anthony J. Scirica

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Argued December 19, 1986

Before: HIGGINBOTHAM and BECKER, *Circuit Judges*, and DUMBAULD, *District Judge**

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**JUDGMENT ORDER**

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* Honorable Edward Dumbauld, United States District Court for the Western District of Pennsylvania, sitting by designation.

After consideration of all contentions raised by appellant in 86-1182, namely, that

(1) there was a variance between the indictment which charged one conspiracy and the proof at trial which established at least two conspiracies, and that such variance prejudiced a substantial right of appellant;

(2) the court erred in its charge to the jury on the single/multiple conspiracy issue;

(3) the court abused its discretion in denying a request for a bill of particulars identifying all co-conspirators on the conspiracy count; and

(4) the court abused its discretion by allowing the government to identify un-indicted co-conspirators who were present in the courtroom in the presence of the jury; and after consideration of all contentions raised by appellant in 86-1183, namely, that

(1) the court plainly erred in permitting the prosecution to introduce in its case-in-chief recurring evidence that co-defendants appearing as government witnesses pled guilty to the charges, including conspiracy, pending against appellant;

(2) the court plainly erred in allowing the government to bolster the credibility of its witnesses by eliciting testimony that their plea agreements required them to take polygraph examinations if they did not testify truthfully;

(3) the trial court improperly denied, without stating its reasoning, appellant's request for a bill of particulars as to the identities of alleged co-conspirators and subordinates;

(4) the court abused its discretion to the prejudice of defendant by permitting the surprise identification at trial of his wife, father, and other relatives and friends, who were seated in the courtroom, as being "involved in cocaine" and/or "the cocaine business";

(5) a substantial right of the defendant was prejudiced by a variance between the indictment and the government's evidence at trial;

(6) the court plainly erred by not properly instructing the jury as to the effect of the evidence of multiple conspiracies;

(7) the court plainly erred in instructing the jury that it should consider the conspiracy charge in this indictment as a predicate offense for the continuing criminal enterprise charge; and

(8) in its supplemental charge to the jury, the court coerced a minority juror to convict; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

_____

*Circuit Judge*

ATTEST:

_____

*Sally Mrvos, Clerk*

Dated: December 30, 1986

Now, let's go to the final count, which is count fifty-six, count fifty-six of the indictment. It charges that from in or about 1978 through 1984, the defendant, William Motto, did engage in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848.

Under Title 21, Section 848, a person engages in a continuing criminal enterprise, if he violates one or more felony provisions of sub-chapter one of chapter 13 of Title 21, United States Code. And if those violations were part of a continuing series of violations of sub-chapter 1 of chapter 12 of Title 21. And the violations were undertaken by such persons in concert with five or more other persons as to whom the person charged occupied a position of organizer or a supervisory or management position. And that the person charged obtained substantial income from such violations.

I'm going to go through this a few times to make sure that you understand all of the elements. There are five elements here.

In order for the defendant to be found guilty of a continuing criminal enterprise, in violation of Section 848, the government must prove five things beyond a reasonable doubt.

First, that the defendant committed the offenses that are charged in the indictment. You'll see the charges in the indictment. I don't ask you to look at them at this time.

Secondly, that the offenses were part of three or more offenses committed by the defendant over a definite period of time, in violation of the federal narcotics laws.

That second one again was that the offenses were part of three or more offenses.

Third, that the defendant committed the offenses together with five or more other persons. Five or more other persons.

Fourth, that the defendant acted as an organizer, supervisor, or manager of the five or more other persons.

Fifth, that the defendant obtained substantial income or resources from the violations. Fifth, that the defendant obtained substantial income or resources from the violations.

The government does not have to prove that all five or more of the other persons operated together at the same time, or that the defendant knew all of them.

The term, income and resources, means receipts of money or property.

Let me go through it in a little different way. Count fifty-six, of course, is asserted only against one defendant in this case, Mr. William Motto. In order to prove that the defendant, William Motto, engaged in a continuing criminal enterprise, the government must prove beyond a reasonable doubt, each of the following elements.

First, that the defendant, William Motto, committed one or more violations of sub-chapter 1 of chapter 13 of Title 21 of the United States Code, that are felonies. That he committed one or more violations of that chapter that are felonies. Such violations may include one, possession of cocaine with the intent to distribute it, as charged in count thirty-four of the indictment. Two, the distribution of cocaine. Three, the use of a telephone in facilitating the conspiracy to distribute controlled substances, and the distribution of controlled substances in violation of Title 21, U.S. Code, Section 843 (b). Four, the conspiracy to possess with intent to distribute and to distribute cocaine in violation of Title 21, United States Code, Section 846, as is charged in count one of the indictment.

Let me repeat that again. These violations may include one, possession of cocaine with the intent to distribute it. Two, the distribution of cocaine. I've given you the definition of those crimes. Three, the use of a telephone in facilitating the conspiracy to distribute controlled substances, and the distribution of controlled substances. I'll give you the definition of that particular crime in a moment. Four, conspiracy to possess with the intent to distribute and to distribute cocaine as charged

in count one of the indictment. I've already given you the definition of that.

The government may prove felony violations beyond those set forth in the specific counts of the indictment, but within the specific time period of the indictment. That is from 1978 to late 1984. As part of its proof of "a continuing series of violations" against the defendant, William Motto, as required under the continuing criminal enterprise charge. That's the first element that the government must prove.

The second element is that such violations by the defendant were part of a continuing series of violations of the federal narcotics laws. And the term, series, requires three or more related felony violations of the federal narcotics laws. The term, series, requires three or more related felony violations of the federal narcotics laws.

The third element of the continuing criminal enterprise charge is that the defendant, William Motto, undertook to commit such a continuing series of violations, in concert with five or more other persons, either named or un-named in the indictment. With five or more other persons, either named or un-named in the indictment. These five other persons need not have acted in concert, at the same time. In other words, the government need only show that William Motto worked in concert with five or more persons over the course of the enterprise.

Fourth, that the defendant, William Motto occupied a position as organizer, or a supervisory position, or a position of manager, with respect to such five or more other persons.

An organizer is a person who organizes or puts together a number of people engaged in separate activities, arranges them in their activities, into one essentially orderly operation or enterprise. A supervisory or managerial position is one in which a person manages or distributes or oversees the activities of others. Such superior/subordinate relationships also need not have existed at the same moment in time. Moreover, the same

type of superior/subordinate relationship need not exist between the supervisor and each of the five other persons involved.

Finally, fifth, that from the continuing series of violations, the defendant, William Motto, has obtained substantial income or resources. Substantial income or resources.

Substantial income does not necessarily mean net income, but can mean substantial gross receipts or substantial gross income. What do I mean by substantial income? What any reasonable person would consider as substantial or considerable funds, from trafficking cocaine, as an organizer or supervisor, or manager.

They are the five elements that the government must prove beyond a reasonable doubt in order to establish and to maintain the continuing criminal enterprise charge against the defendant, William Motto.

I told you that one of the crimes that the government contends Mr. Motto engaged in, and which the government contends constitutes one of the felonies which they are required to prove, was that involving the unlawful use of a telephone. Let me define for you what that crime is.

No. 86-1416

# In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM MOTTO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court committed plain error by admitting into evidence the testimony of a government witness concerning a provision of a plea agreement that required the witness to take a polygraph examination if requested to do so by the government.

2. Whether conspiracy to engage in a narcotics offense, in violation of 21 U.S.C. 846, may serve as one of the predicate offenses for a conviction of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 30, 1986. The petition for a writ of certiorari was filed on February 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. III) 848; and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 20 years' imprisonment

without possibility of parole, to be followed by a five-year probation period, and he was fined $125,000.[1]

The evidence at trial showed that one Larry Lavin headed a large-scale cocaine distribution operation. In 1981, for example, the operation purchased approximately 250 kilograms of cocaine for resale at a price of between $54,000 and $56,00 per kilogram.[2] Lavin's representatives purchased the cocaine in Florida and transported it to Philadelphia by commercial airline or car, depending on the size of the load. The cocaine was sold to customers in many states.

Petitioner was one of Lavin's largest customers. Before 1981, petitioner purchased his cocaine premixed and ready for sale. In early 1981, Lavin directed one of his associates to teach petitioner how to prepare and cut cocaine for individual orders so that petitioner could purchase pure cocaine and process it himself. The associate also taught petitioner how to test the cocaine for purity. From that time on, petitioner bought pure, uncut cocaine at close to cost, often investing in shipments from Florida by paying Lavin for the cocaine in advance.

Under Lavin's guidance, petitioner built his own distribution organization—under the umbrella of the Lavin operation—by using the Lavin model. Whenever Lavin introduced new distribution techniques, petitioner implemented them as well. For example, when petitioner learned that Lavin's workers were able to make recompressed rocks of cocaine look like solid rocks, petitioner had a Lavin associate teach the process to one of his own workers.

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[1] Petitioners' co-defendants, Vito Mirro and Pasquale Giordano, also were convicted of various narcotics offenses.

[2] The factual summary is taken from the government's brief in the court of appeals.

Like Lavin, petitioner insulated himself from the day-to-day operation of the enterprise by setting up a system of managers and workers. In 1980, he hired co-defendant Vito Mirro to manage his cocaine sales. Mirro was replaced in 1983 by Nicky Bongiorno and in 1984 by petitioner's brother Vincent Motto. Although petitioner employed a number of managers and workers, he preferred to select the cocaine himself to ensure that it was of the highest quality. In addition, when petitioner's workers delivered money to Lavin, Lavin's workers attributed the payments to petitioner on their drug ledgers.

In the summer of 1983, Lavin—concerned that he was under investigation by law enforcement authorities—sold to Franny Burns the "rights" to supply cocaine to Lavin's larger customers. Lavin had offered to sell these rights to petitioner, but petitioner rejected the offer because he thought he "would be buying the heat." After the sale, Burns sold many multi-kilogram loads of cocaine to petitioner.

In 1984, petitioner, Burns, and Bruce Taylor, who inherited Lavin's small customers, continued to contact Lavin to discuss their cocaine dealings. Thus, in a telephone conversation, Lavin told Taylor that he had just spoken to petitioner about the availability of methanol, a chemical used in testing the purity of cocaine. Petitioner and Bongiorno also called Lavin. When Taylor was arrested, Lavin was the first person he contacted; petitioner, his brother, and Burns subsequently met to discuss the arrest. After Lavin and Burns were indicted in September 1984, Lavin collected cocaine debts for Burns, including approximately half a million dollars that was owed by petitioner. Petitioner told one of Lavin's associates that he had made millions of dollars from the cocaine business.

On appeal, petitioner raised several challenges to his convictions. The court of appeals rejected those arguments and entered a judgment order affirming petitioner's convictions (Pet. App. A1-A3).

## ARGUMENT

1. Twelve of the government's witnesses testified at trial pursuant to negotiated plea agreements. Each plea agreement provided that the witness could be required, at the government's option, to take a polygraph examination to test the truthfulness of his disclosures. On direct examination, the first government witness testified concerning the polygraph provision in his plea agreement (1 Supp. App. 88). Petitioner contends (Pet. 4-5) that the trial court's failure to exclude that testimony constituted reversible error.

Several courts have held that evidence of a witness's willingness to take a polygraph examination is inadmissible. See *United States* v. *Hilton*, 772 F.2d 783, 785-786 (11th Cir. 1985); *United States* v. *Brown*, 720 F.2d 1059, 1069-1075 (9th Cir. 1983); *United States* v. *Bursten*, 560 F.2d 779, 785 (7th Cir. 1977). But petitioner did not object to the admission into evidence of the testimony regarding the polygraph provision; the only objection was made by petitioner's co-defendant Pasquale Giordano (1 Supp. App. 88).[3] Accordingly, petitioner is entitled to the reversal of his convictions only if he establishes that the district court's ruling constituted plain error that "affect[ed] substantial rights" (Fed. R. Crim. P. 52(b)). He cannot make that showing, for two reasons.

First, petitioner used the polygraph provision of the plea agreements as the centerpiece of his effort to impeach the credibility of the government's witnesses. Thus, petitioner's counsel repeatedly cross-examined the government witnesses about the polygraph provision and about the government's failure to require the witnesses to submit to

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[3] At the start of trial the court instructed the defense attorneys that if they intended to join in any objection made by other counsel during trial, they should specifically so indicate (1 Supp. App. 2-3). Petitioner did not join in Giordano's objection.

polygraph tests (1 Supp. App. 143, 467-468, 512-514, 850; 2 Supp. App. 1078-1079, 1269, 1438-1439, 1683, 1801-1802; 3 Supp. App. 2068, 2699-2700); on three occasions his counsel even read the polygraph provision into the record (2 Supp. App. 1079; 3 Supp. App. 2700, 2929). Petitioner's counsel described the polygraph provision as integral to the "entire defense," and he objected to any "statement to the Jury that the polygraph test is not a reliable test" for fear that the defense would be undercut (3 Supp. App. 2087).

Following the direct examination of its first witness, the government carefully avoided reference to the polygraph provision on direct examination; it returned to the subject only after the defense had questioned nine witnesses about the provision, and for the sole purpose of adducing evidence that one of the government's witnesses had taken the examination and had failed it (2 Supp. App. 1927-1928).[4] Furthermore, the government made no attempt to exploit the polygraph provision in its closing argument.

Petitioner's trial counsel obviously concluded that informing the jury of the existence of the polygraph provisions would be *helpful* to petitioner's effort to impeach the government's witnesses; he therefore took every opportunity to refer to the existence of those provisions. Petitioner cannot now claim that the same information was *harmful* to his case on the ground that it bolstered the witnesses' credibility, especially where his own counsel was responsible for emphasizing the importance of the polygraph provision. Cf. *United States* v. *Chilcote*, 724 F.2d 1498, 1504 (11th Cir.), cert. denied, 467 U.S. 1218 (1984).

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[4] The prosecutor explained (2 Supp. App. 1928) that he adduced the evidence in anticipation that the defense intended to make an issue of the witness's failure to pass the examination, a fair assumption given the defense's previous repeated use of the polygraph provisions in the plea agreements.

Second, in view of the overwhelming evidence supporting petitioner's convictions, the reference to a polygraph test in the direct examination of the first government witness was, at most, harmless error. As we have noted, the record contains abundant evidence supporting the jury's determination that petitioner engaged in a variety of drug offenses. The admission of the reference to the polygraph provision in the witness's plea agreement therefore could not have affected the outcome of the case.

The decisions of the other courts of appeals do not dictate a different result. The defendants in each of the other cases objected to the admission of the evidence regarding polygraph tests; the courts of appeals therefore were not called upon to apply a plain error standard. See *United States* v. *Hilton*, 772 F.2d at 785-786; *United States* v. *Brown*, 720 F.2d at 1070; *United States* v. *Bursten*, 560 F.2d at 785. Moreover, despite the defendants' contemporaneous objection, the court in the *Bursten* case declined to reverse the defendant's convictions, finding that the admission of the reference to polygraph testing was harmless error (560 F.2d at 785). Those decisions therefore do not justify a finding of plain error on the facts of this case.

2. Petitioner contends (Pet. 5-7) that the district court erroneously instructed the jury that it could not convict him on the continuing criminal enterprise (CCE) count without using as a predicate offense the Section 846 conspiracy charged in Count 1 of the indictment.[5] Petitioner is wrong in asserting that the district court instructed the jury that it was *required* to use the Section 846 conspiracy as a predicate offense in order to convict petitioner on the CCE count; the court told the jury that it *could* use the

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[5] In order to prove a continuing criminal enterprise, the defendant must be shown to have engaged in a "continuing series of [narcotics] violations" (21 U.S.C. 848(b)(2)).

conspiracy as a predicate offense (Pet. App. A5-A6; 4 Supp. App. 3847-3848). The instruction was thus permissive, not mandatory.

Furthermore, the instruction was correct. The language of Section 848(b)(1) unambiguously states that a violation of "any provision of [either subchapter I or II of Chapter 13 of Title 21] the punishment for which is a felony" constitutes a permissible predicate offense. Since the statutory provision proscribing drug conspiracies (21 U.S.C. 846) is contained in the relevant portion of Title 21, a violation of that provision may serve as a predicate offense. Petitioner has pointed to nothing in the legislative history of the CCE provision indicating that Congress intended to forbid the use of a drug conspiracy charge as a predicate offense for a CCE conviction. See H.R. Rep. 91-1444, 91st Cong., 2d Sess., Pt. 1, at 50 (1970).

Several courts of appeals have concluded that a conspiracy offense may serve as one of the predicate offenses for purposes of a CCE charge. See *United States* v. *Grayson*, 795 F.2d 278, 285-286 (3d Cir. 1986), cert. denied, No. 86-6163 (Apr. 20, 1987); *United States* v. *Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986); *United States* v. *Young*, 745 F.2d 733, 748-752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Brantley*, 733 F.2d 1429, 1436 n.14 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Middleton*, 673 F.2d 31, 33 & n.2 (1st Cir. 1982).

The Fourth Circuit has indicated, in dictum, that a conspiracy offense may not be used as the principal predicate offense for the CCE charge. *United States* v. *Lurz*, 666 F.2d 69, 76 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982); see also *United States* v. *Jefferson*, 714 F.2d 689, 702 n.27 (7th Cir. 1983) (reciting *Lurz* rule in dictum). But that court more recently intimated that its prior statement on the issue might have been incorrect. It has also made clear that *Lurz* related only to the principal felony offense

underlying the CCE conviction; it did not prohibit the use of a conspiracy offense to show the series of predicate acts required to establish a CCE violation. See *United States* v. *Ricks*, 776 F.2d 455, 464 n.16 (4th Cir. 1985), cert. denied, No. 86-759 (Dec. 8, 1986). The Fourth Circuit rule therefore appears to be unsettled at the present time.[6]

Moreover, there plainly is no conflict between the Fourth Circuit standard and the decision in the present case. The defendant in *Ricks* had failed to object to the jury instructions relating to the use of the drug conspiracy offense as a predicate for the CCE charge; under those circumstances, the Fourth Circuit held that those instructions were not plain error (776 F.2d at 463-464). Petitioner similarly failed to interpose an objection to the instruction in this case. It is therefore clear that the Fourth Circuit would have reached the same result as the court below on the facts of this case. Accordingly, this case presents no conflict among the circuits and does not warrant review by this Court.

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[6] In *Jeffers* v. *United States*, 432 U.S. 137 (1977), a plurality of this Court found that a defendant in some circumstances may not receive cumulative punishment for a CCE conviction and a drug conspiracy conviction. Petitioner does not argue that the result in *Jeffers* bars the use of conspiracy as a predicate offense. The conspiracy charge in *Jeffers* itself did not serve as a predicate for the CCE conviction (see 432 U.S. at 141, 142-143 (plurality opinion)). Indeed, even if CCE and conspiracy charges cannot be brought in separate proceedings and are not subject to cumulative sentences, that fact would not mean that Congress intended to exempt a drug trafficker from liability for CCE simply because one of the offenses involved in his series of three violations was a conspiracy. See *United States* v. *Young*, 745 F.2d at 750-751. The decisions of the court of appeals cited by petitioner (other than *Lurz*) address the multiple punishment question and therefore are irrelevant here.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40363